IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 180

WILLIAM L. GREENE, *Petitioner*

v.

NEIL H. McELROY, THOMAS S. GATES, JR. and ROBERT B. ANDERSON

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

CARL W. BERUEFFY
215 C Street, N. W.
Washington 1, D. C.
Attorney for Petitioner

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The opinion of the Court of Appeals (R. 480-496) s reported at 254 F. 2d 944. That of the District Court (R. 476, 477) is reported *sub nom., Greene* v. *Wilson,* at 150 F. Supp. 958.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1958. (R. 496). The petition for a writ of certiorari was filed July 16, 1958, and was granted October 27, 1958. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The petitioner, an aeronautical engineer, who was an officer and employee of a private corporation, was denied access to classified information and was excluded from his employer's plant by the Secretary of the Navy. As a necessary consequence, he was discharged from his position. He instituted this suit, seeking a declaration of the invalidity of the order and injunctive relief against it, alleging that the order was without foundation in fact, was beyond the statutory authority of the Secretary, and was in violation of petitioner's right, under the Fifth Amendment to the Constitution of the United States, not to be deprived of his liberty and property without due process of law. The respondents asserted that they had acted in pursuance of a contract between themselves as representatives of the government and plaintiff's employer, which contract authorized them to designate employees to be denied access to classified information. Does the suit present a justiciable controversy which the District Court had jurisdiction to entertain?

2. Whether the provisions of the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C., § 153, authorizing defense procurement contracts "of any type which in the opinion of the agency head will promote the best interests of the government," can be

construed to grant Department of Defense officials unlimited discretion to cause the discharge of employees of private business enterprises by denying such employees access to classified information and requiring their exclusion from the plant of a private employer?

3. Whether the provisions of the Armed Services Procurement Act of 1947, if so interpreted, are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States?

4. Whether the authority of the Defense Department to deny access to classified information and to require exclusion from privately owned plants, if such authority exists, is unlimited, or is so limited that it may be exercised only for valid reasons?

5. Whether, if such action is required to be founded upon valid reasons, a statement of reasons which recites only conduct which is neither illegal nor immoral, and all of which occurred at least seven years prior to the issuance of such statement, is sufficient as a basis for such denial?

6. Whether the requirements of procedural due process are violated by the Industrial Personnel Security Regulations, which permit denial of access to information necessary for private employment on the basis of an inference by a governmental official of possible future conduct, which inference is supported by a "statement of reasons" based on purported information, the nature and source of which is not revealed to the employee; and which is supplied by persons who are not required to furnish such information under oath, nor to be cross-examined; and which information the affected employee has no real oppor-

tunity to refute or explain, although the regulations place the entire burden of proving innocence upon the employee?

STATUTES AND REGULATIONS INVOLVED

The statutes, executive orders, and regulations considered to be involved in this case are set out verbatim in Appendix A, infra, pp. 1a-18a, and include the following:

Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C., §§ 151, 153.

Revised Statutes, § 161, 5 U.S.C. (1952 edition), § 22, as amended, Public Law 85-619, 72 Stat. 547.

Internal Security Act of 1950, Public Law 831, ch. 1024, Title I, §§ 3, 5; 50 U.S.C. (1952 edition), §§ 782, 784.

Administrative Procedure Act, Act of June 11, 1946, § 5, 60 Stat. 239, § 6, 60 Stat. 241, § 7, 60 Stat. 242, § 10, 60 Stat. 243, 5 U.S.C. (1952 edition), §§ 1005, 1006, 1007, 1009.

Executive Order 10290, September 27, 1951, 16 Fed. Reg. 9795.

Industrial Personnel and Facility Security Clearance Program, OPNAVNOTE 5510, May 4, 1953.

STATEMENT OF THE CASE

The petitioner, William L. Greene, is a resident of the State of Maryland. (R. 1) By profession, he is a trained and experienced aeronautical engineer, a graduate of Guggenheim School of Aeronautics of New York University. (R. 473) Immediately following his graduation from college, he was employed by Engineering and Research Corporation. He continued, ex-

cept for a four month leave of absence, in the employment of that company until April, 1953. (R. 471)

The progress of his work with ERCO was as follows:

May, 1937, employed as junior engineer. (R. 471)
Spring, 1940, four months leave of absence to work for General Motors (R. 185, 186).
11/4/40, project engineer on propellers. (R. 253)
10/1/42, promoted to administrative engineer. (R. 253)
8/18/43, promoted to chief engineer of propeller division. (R. 254)
1/1/46, promoted to development engineer. (R. 254)
1948, promoted to chief engineer of company. (R. 472)
1951, elected Vice President in charge of engineering. (R. 472)
late 1952 or early 1953, made general manager. (R. 472).

The history of steady promotions and increasing responsibility indicates Greene's ability, diligence, and loyalty. Direct confirmation of the high regard of his associates was given by Colonel Henry A. Berliner, chairman of the board of ERCO and its principal stockholder, (R. 306) who testified, (R. 313)

> . . . I watched him very closely anyway. We felt that he had potential qualities that ultimately he was going up at least to the general managership of the company. He was the best of the younger men we had there. I kept very close tabs on him for that reason; also being and having become a project engineer at a fairly early age that alone made him stand out . . .

During this career at ERCO, in the years 1947 and 1948, Greene also held an instructorship at the Catholic University of America. (R. 190). Earlier, in 1945, he had, under the joint auspices of industry and the Air Force, made a four month trip to Germany to evaluate industrial ideas which had been developed by the Germans. (R. 190)

The high regard of his superiors (Letter of Lester A. Wells, President of ERCO, R. 33) was confirmed by military officers who knew him. (Rear Admiral T. A. Solberg, retired chief of Naval Research, R. 66, 67; Colonel John C. Robertson, Chief of the Training Aids Division of the Air Force, R. 53) Their estimate was shared by his professional colleagues. (Gordon S. Light, R. 272; Edward D. Burgess, R. 332; Herbert L. Stout, R. 336; Norman A. Hubbard, R. 343; Thomas M. Mountjoy, R. 358).

The respect for his professional ability enjoyed by Greene extended to an appreciation of his loyalty and discretion. (Lester A. Wells, R. 33; Light, R. 272; Stout, R. 336[1]; Hubbard, R. 343; Mountjoy, R. 357; Clarence J. Clements, Jr., R. 391). Milton W. King, general counsel for ERCO, who represented Greene in the hearing before the Industrial Personnel Security Board, testified at the second hearing. Mr. King, a former president of the District of Columbia Bar Association (R. 287), testified that he made an "exhaustive examination" for the purpose of deter-

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[1] Stout testified: "It [the suspension of Greene's clearance] had come as a great shock to the personnel in the plant. They just couldn't believe there was any connection whatsoever, from the ones that had had close contact with him and worked with him."

mining whether, irrespective of the outcome of the proceeding before the Industrial Employment Review Board, ERCO should retain Greene in its employment. His conclusion was that "there was no question about" Greene's loyalty and security. (R. 288, 289)

During the time that Greene was employed by ERCO, the question of his access to classified information had been considered on several occasions. He was granted such access without question on three such occasions. These clearances were for "confidential" on August 9, 1949, by the Army; for "Top Secret" by the Assistant Chief of Staff G-2, Military District of Washington, on November 9, 1949; and "Top Secret" by the Air Materiel Command on February 3, 1950. (R. 28).

The first challenge to Greene's clearance was made by the Army-Navy-Air Force Personnel Security Board in November, 1951. (R. 31) In accordance with the then existing regulations, Greene requested the opportunity of appearing before the Industrial Employment Review Board. (R. 37) This board supplied him with a generalized statement (R. 37) of the matters which were considered to have a bearing on his clearance for access to classified material. A proceeding in which Greene appeared, testified, and was cross-examined by the board, followed. He also produced witnesses who testified in his behalf.

During this proceeding, all of the matters, with the exception of those contained in paragraphs 5 and 11, which are set forth in the subsequent statement of the Eastern Industrial Personnel Security Board were the subject of extensive inquiry by the board.[2]

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[2] The statement (R. 9-11) supplied by Eastern Industrial Personnel Security Board is set forth, and the items separately discussed in Appendix B, *infra* pp. 19a-29a.

Following this proceeding, the Industrial Employment Review Board reversed the decision of the Army-Navy-Air Force Personnel Security Board, and restored Greene's clearance. (Exhibit 7 to Stipulation of Facts, R. 172). The standard for revocation of clearance at the time of these proceedings was "that access by you [Greene] to contract work and information as specified would be inimical to the best interests of the United States. . . ." (Exhibit 3 to Stipulation of Facts, R. 34).

On March 27, 1953, the Secretary of Defense abolished the Army-Navy-Air Force Personnel Security Board and the Industrial Employment Review Board, and directed the establishment of regional personnel security boards within thirty days. This memorandum directed that the criteria governing actions by the Industrial Employment Review Board should prevail until the establishment of uniform criteria in accordance with the directions contained in the memorandum. (Exhibit 8 to Stipulation of Facts, R. 173-175).

The Eastern Industrial Personnel Security Board was established in compliance with this direction by a joint directive of the Secretaries of the Army, Navy, and Air Force on May 4, 1953.

On April 17, 1953, during the period in which no machinery for the determination of clearance matters was in existence, although the former criteria had specifically been continued in effect, Robert B. Anderson, then Secretary of the Navy, issued the order which forms the basis of this suit. It was a letter addressed to Engineering and Research Corporation, which reads: (R. 2, 3)

I have reviewed the case history file on William Lewis Greene and have concluded that his continued access to Navy classified information is inconsistent with the best interests of National Security.

In accordance with paragraph 4.e of the Industrial Security Manual for Safeguarding Classified Information, therefore, *you are requested to exclude William Lewis Greene from any part of your plants, factories or sites at which classified Navy projects are being carried out,* and to bar him access to all Navy classified security information.

In addition, I am referring this case to the Secretary of Defense recommending that the Industrial Employment Review Board's decision of 29 January 1952 be overruled. [Emphasis supplied]

Secretary Anderson never gave Greene any direct notice of this action. No opportunity to be heard in connection with this reversal of the previous decision was offered.

The letter of April 17, 1953, was received at Engineering and Research Corporation on April 21, 1953. (R. 472). Under the regulations, Greene could not retain his position as Vice-President and General Manager in the absence of clearance. 32 C.F.R., § 72.2-107 (Supp. 1956). At that time, Mr. Wells, president of ERCO, told Greene that under the circumstances, it would be impossible for him to continue in the company's employment. The reasons given by Mr. Wells were, Greene could not discharge his duties without access to the data relating to projects on which the engineering division was engaged; it was impossible to segregate the Navy work; and the Navy's status as

the company's principal customer made the retention of its goodwill essential, (R. 472). This view was confirmed by Colonel Berliner, who stated in his affidavit, (R. 471):

> In April, 1953, the company received a letter from the Secretary of the Navy advising us that clearance had been denied to Mr. Greene and advising us that it would be necessary to bar him from access to our plant. In view of his position with the company, there was no work which he could do in light of this denial of clearance by the Navy. As a result, it was necessary for the company to discharge him. There was no other reason for Mr. Greene's discharge, and in the absence of the letter referred to, he could have continued in the employment of Engineering and Research Corporation indefinitely.

The desire of ERCO to retain Greene in its employment was further shown by Mr. Wells' letter, dated February 25, 1954, in which he said: (R. 473, 474).

> As you are aware, we have been holding open the position of General Manager hoping that your case would be cleared up so that you could return to us in that capacity. * * *
>
> You know, of course, that we feel strongly that we would like to have you back since your seventeen years with the company gives you a big advantage over any outsider that we would have to bring in.

At the time that the letter from Secretary Anderson was received by ERCO, Mr. Wells immediately wrote Secretary Anderson, pointing out that Greene's "knowledge, experience and executive ability have proven of inestimable value in the past. The loss of his services at this time is a serious blow to com-

pany operations. Accordingly, we should like the privilege of a personal conference to discuss the matter further." (R. 176). The reply to this request was, "As far as the Navy Department is concerned, any further discussion on this problem at this time will serve no useful purpose." (R. 177).

Without clearance, Greene was unable to find any other work in his profession of aircraft engineering. (R. 473)

The regulations governing the conduct of the regional Industrial Personnel Security Boards were subsequently adopted and the Eastern board began its operations. On October 13, 1953, in response to Greene's demands for a hearing (R. 29), Assistant Secretary J. H. Smith advised Greene that he had requested the Eastern Industrial Personnel Security Board to accept jurisdiction of the case. (R. 21)

Nineteen days before the hearing (R. 9), Greene received a statement of reasons for the denial of his clearance. These charges related to associations and activities many of which were related to his former marriage to Jean Hinton Greene, which had been terminated by divorce in December, 1947, more than five years before.

Finally, the proceedings of the Eastern Industrial Personnel Security Board were held April 28-30, 1954. In these proceedings, the Board presented no witnesses. Thirteen witnesses testified on behalf of Greene, and twenty-four exhibits, which consisted of newspaper reports and other documents contemporaneous with the matters to which the Board had directed attention were introduced in evidence. All of

the matters, except as noted, had previously been discussed by the Industrial Employment Review Board. (See Appendix B, *infra*, pp. 19a-29a.)

The Board reached its decision, which was communicated to Greene in a letter dated May 28, 1954. (R. 462, 463). Its decision was "that, on all the available information, the granting of clearance to you for access to classified information is not clearly consistent with the interests of national security." (R. 463). No statement of the reasons which motivated the Board in this decision was supplied. In making its decision, the Eastern Industrial Personnel Security Board took into consideration the whole file of the case, "which includes information, neither the content nor source of which has been revealed to the plaintiff." (Stipulation of Facts, ¶ 23, R. 30).

Greene, through his counsel, immediately requested a statement of the findings of the Board and a transcript of the hearing, pointing out the necessity of such documents in the preparation of a petition for reconsideration. (R. 463, 464). In response to this request, the executive secretary of the Board wrote,

> Security considerations prohibit the furnishing to an appellant of the detailed statement of the findings on appeal inasmuch as the entire file is considered and comments made by the Appeal Division panel on security matters which could not for security reasons form the basis of a statement of reasons.

The transcript of the proceedings, was promised "as soon as possible." (R. 465).

The present suit was filed August 20, 1954. At that time, the transcript had not yet been supplied. (R. 5).

Following the institution of this suit, a further change in the security regulations took place. Under these regulations, review by the Office of Industrial Personnel Security Review was permitted in some instances. In response to a suggestion of Assistant Secretary R. F. Fogler, a request for such a review was made on behalf of Greene. This request called attention to the pendency of the litigation, and stated that it was made without prejudice to either side in the suit. (Exhibit 19 to Stipulation of Facts, R. 465, 466). This review terminated in the adverse decision of the Industrial Personnel Security Review Board. (Exhibit D to Amended and Supplemental Answer, R. 22-24).

Following the termination of these proceedings, the parties entered into a stipulation of facts in the present suit, and filed cross-motions for summary judgment. (R. 27, 470, and 474).

The District Court sustained the motion of the defendants and denied that of the plaintiff. (R. 479). It based its order on the conclusion that Engineering and Researeh Corporation, having voluntarily entered into the security contract, was obliged to follow all of its terms, and that the action of the government, even if it caused Greene's discharge, invaded no legal right which he had. (R. 478).

This judgment was followed by an appeal to the United States Court of Appeals, which affirmed the judgment of the District Court. (R. 496). The Court of Appeals, while conceding the reality of the injury to Greene, (R. 494), concluded that the controversy was not one which the courts could finally and effectively decide. It rested its opinion on the conclusion

that the determination of security risk must involve considerations of policy and decisions as to comparative risks, appropriate only to the executive branch of the Government. (R. 495).

Following this decision of the Court of Appeals, the petition for a writ of certiorari was filed on July 16, 1958, and was granted by this Court on October 27, 1958.

SUMMARY OF ARGUMENT

I.

This case involves a justiciable controversy. The order of Secretary Anderson which is attacked in this case, as a practical matter, caused Greene's discharge from his employment as Vice President and General Manager of Engineering and Research Corporation, a private corporation. The alternative to the discharge of Greene was the loss of Department of Defense contracts in the amount of some thirty million dollars. The dominant status of the government as the purchaser of aircraft makes the denial of clearance the equivalent of the denial of employment in this industry.

Thus to cause the discharge of an employee of a private corporation was an interference with the constitutionally protected right to contract with reference to one's employment, a right which ranks high in constitutional protection. Interference with that right gives Greene standing to sue to protect it against an arbitrary interference, since the right includes a manifest interest in the freedom of the employer in the exercise of his own judgment. Although the order of which complaint is made did not in direct terms re-

quire Greene's discharge, an emphasis on the form of the order should not be permitted to obscure the practical effect.

The respondents' contention that Greene had no standing to sue is based upon the assertion of an unlimited right to grant or deny clearance to classified information. Such unlimited discretion would give the military departments control over the employment of some three million persons, and is at variance with the nature of our governmental institutions. The government's right to contract can not be exercised in a fashion that arbitrarily interferes with the contract rights of others. Even if the access to classified information is a "privilege," a governmental official can not deny such a privilege except for valid reasons. Clearly, the Government could not deny access to all persons with red hair, or all Unitarians. See *United Public Workers* v. *Mitchell*, 330 US 75, 100, and comment on this passage in *Wieman* v. *Updegraff*, 344 US 183, 191, 192.

II.

The Industrial Security regulations deny procedural due process. To deprive a citizen of his constitutional right to follow a lawful calling, a minimum prerequisite is a notice, hearing, and an opportunity to defend. The original order was issued without any such notice, and clearly departed from the rudiments of fair play which are required by the due process clause. Nor was this lack of due process supplied by the subsequent proceedings before the Eastern Industrial Personnel Security Board, because the regulations under which that board conducts its proceedings are clearly lacking in fairness.

What is basic fair play required by the Fifth Amendment varies with the circumstances, one of which, of course, is the nature of the rights which are involved. The governmental officials assert that they are protecting the national security, and this right is an important one. However, there is no necessity for depriving a citizen of all reasonable opportunity to defend his employment, a right also of high standing. Specific violations of the requirement of due process which are inherent in the Industrial Personnel Security regulations are the absence of a requirement that the employee be advised of all of the matters raised against him; the prohibition of a decision upon an open record and the failure to require that adverse witnesses be cross-examined; the shifting of the burden of proof to the employee, a burden made more unfair by the failure to define in specific terms the prohibited conduct.

Judged in the totality of its impact upon the injured employee, the action of the Secretary in pursuance of the procedures created by these regulations deprived him of fair notice, of knowledge of the evidence which he was required to meet, and of any reasonable opportunity of refuting information of which he was never advised. These absences created an unfairness justified by no reasonable balance of the conflicting rights.

III.

The Industrial Personnel Security regulations are assumed to rest upon a contract between the Department of Defense and the government contractor. There is no statute expressly giving the respondents the authority to make such a contract, nor can any such power be implied from the provisions of the

Armed Services Procurement Act of 1947. Especially is a limited construction of the authority granted by this act necessary in the light of the principles of interpretation expressed by this Court in *Kent* v. *Dulles*, 357 U.S. 116, 129.

Congress has never focused upon the problem of industrial security clearances and specifically authorized them. However, its rejection of a broad grant of authority to exclude subversives from defense facilities because of the failure adequately to protect the constitutional rights of citizens, indicates that had it so focused, it might very well have granted more limited authority with more adequately defined procedural safe-guards. The action of Congress in providing for the exclusion of subversives from defense plants in accordance with the Subversive Activities Control Act is inconsistent with action to the same end by the Department of Defense Officials.

IV.

The Industrial Personnel Security regulations are invalid because they deny substantive due process. The war power, like all powers of the federal government, is subject to the limitations of the Fifth Amendment. Under that constitutional provision, governmental action must be rationally related to a permissable end of the government. Here, the end open to the government is the prevention of espionage and sabotage. But the ideological tests of the security regulations have proved themselves ineffective for that purpose, and have caused substantial harm to the liberties protected by the Constitution. The greatest protection to our national security lies in preserving those liberties.

ARGUMENT

I. IN THIS CASE, THE PETITIONER ASSERTS AN ARBITRARY INVASION OF HIS CONSTITUTIONALLY PROTECTED RIGHT OF FREEDOM FROM INTERFERENCE WITH HIS EMPLOYMENT. THE CASE PRESENTED IS A JUSTICIABLE CONTROVERSY WHICH THE COURTS BELOW HAD JURISDICTION TO ENTERTAIN.

The initial problem involved in this case is whether there is a justiciable controversy. Both of the lower courts held that no such justiciable controversy existed. The District Court premised its conclusion on the assertion that Greene's employer had voluntarily agreed that the Defense Department could call for the exclusion of the contractor's employees, and that for that reason, Greene had suffered no legal harm. (R. 478). The Court of Appeals reasoned that the determination of the existence or non-existence of a security risk was a matter peculiarly within the competence of the executive and not of the courts to decide. (R. 489 et seq.)

This issue is posed by the conflicting contentions of petitioner and respondents as to what was actually accomplished by the order of Secretary Anderson.

Greene asserts that the letter of April 17, 1953, caused his discharge by ERCO, prevented his securing other employment, and in the context of the Industrial Personnel Security regulations defamed him by casting doubt upon his loyalty to the United States, or his moral responsibility. The respondents, on the other hand, contend that they merely exercised the right of the government "to refrain from giving contracts for secret military equipment to contractors whose employees it does not fully trust. Rather than withhold contracts altogether from such contractors, however, it has given the contractor the choice of agreeing to

keep the secret information out of the hands of such employees." (Brief for Respondents in Opposition to Petition for a Writ of Certiorari, p. 12).

It can hardly be doubted that the letter of Secretary Anderson caused Greene's discharge. Whether or not ERCO might have retained Greene in some position, it could continue him in the position of its vice president and general manager only by surrendering its business relationships with the Department of the Navy, since the regulations require clearance for all officers of a corporate contractor. 32 C.F.R., § 72.2-107 (Supp. 1956). Since the company operated only one plant, in which it was impossible to segregate the Navy work, (R. 472), and since the letter required Greene's exclusion from plants in which Navy work was being carried on, (R. 2), it was perfectly clear that ERCO was required to choose between retaining Greene in its employment or continuing to perform Defense Department contracts. In reality, it was required to discharge Greene or go out of business itself.

In January, 1952, ERCO employed two thousand people and was engaged in performing about thirty million dollars' worth of military contracts. (R. 73) In the field of aircraft manufacture, the military departments are the almost totally dominating customer. In the year 1952, the total production of planes was 12,509 aircraft, of which approximately 9,000 were military planes, 193 were commercial transports, and 3,316 were utility planes. The following year, production was estimated at 16,000 planes of which 12,000 were military types, 205 were large commercial transports and 4,495 were utility aircraft. Encyclopaedia Britannica, *Book of the Year 1954*, p. 31 (Chicago,

1954). Military business normally constitutes 85 per cent of the aircraft industry's total shipments. Standard & Poor's, *Basic Industry Surveys, Aircraft,* Vol. 126, No. 11, Sec. 1, p. A7, March 13, 1958. A refusal on the part of ERCO, or any other aircraft manufacturer, to execute the military department's security agreement and to abide by its terms, would mean that it had voluntarily shut itself off from participation in the significant bulk of the industry's market.

As the Court of Appeals said, (R. 494)

> As a practical matter—given Greene's position as Vice President and General Manager and given the applicable Industrial Security regulations—the Government caused Greene to be dismissed from his job at ERCO. The small contractor has no effective choice when that choice is either to continue to do business with the Government or to do virtually no business at all. Nor do we doubt that, following the Government's action, some stigma, in greater or less degree, has attached to Greene.

There can be no serious question that the threat of economic sanctions which were directed against it,[3] deprived ERCO of any freedom of judgment, or that, had it been permitted to exercise its own judgment, the company would have retained Greene in its employment. Its action in keeping the general managership vacant for almost a year (R. 473, 474) is the most com-

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[3] That the sanction was actually directed against the employer is shown by an examination of the previous correspondence. Exhibit 1 to the Stipulation of Facts, (R. 31, 32) is a letter addressed to Engineering and Research Corporation which states, "Based on information tentatively available to it, the Board has tentatively decided that consent for access must be denied and *your clearance* . . . must be revoked. [Emphasis supplied]

pelling proof of what it would have done, if permitted free choice in the matter.

Consequently, the practical effect of the letter written by Secretary Anderson was that of depriving Greene of employment which he otherwise assuredly could have retained. The right to contract with reference to one's employment, free of arbitrary interference on the part of governmental authority is one of the most important rights included within the protection of the due process clause. It "goes to the very heart of our way of life."[*] This right, the importance of which can scarcely be underestimated in our economic structure, has received consistent judicial protection under the Constitution. See, e.g., *Truax* v. *Raich,* 239 U.S. 33; *Parker* v. *Lester,* 227 F. 2d 708 (CA 9, 1955). Of course, this right, like all rights under the Constitution, is subject to reasonable regulation in the public interest, but as this Court said, in upholding the validity of educational requirements for the licensing of physicians, in *Dent* v. *West Virginia,* 129 U.S. 114, 121:

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession as he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions.

That Greene's interest in his employment with Engineering and Research Corporation is such as to give him standing to protect it against an arbitrary

[*] Mr. Justice Douglas, dissenting in *Linehan* v. *Waterfront Commission,* 347 U.S. 439, at p. 441.

or unjustified interference is obvious. This Court, in *Truax* v. *Raich*, 239 U.S. 33, 38, said, "The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion . . ." and observed that, "it is idle to call the injury indirect or remote."[5] It is true that the respondents in the letter of April 17, 1953, made no demands on Greene. But this does not render the invasion of his right less direct. Demands on a third person which deprive a person of his direct rights are frequently recognized as supplying the necessary standing to sue. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, the threat against which the complaining organizations sought relief was aimed against government employees and interfered with their freedom to become members. In *Truax* v. *Raich*, 239 U.S. 33, the thrust was against the employer and not against the employee who sought relief. In *Buchanan* v. *Warley*, 245 U.S. 60, the statutory prohibition on its face was directed against the occupant of a residence. The complainant was a seller of property, but his standing to sue was recognized. See also: *Barrows* v. *Jackson*, 346 U.S. 249, 254-258; *Pierce* v.

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[5] The right protected by the constitution, and for which judicial protection is claimed in this suit is that of freedom from arbitrary interference with such contract relationships between employer and employee. It is undeniable that, left to their own judgment, the employer and the employee in this case would have continued the relationship. *Black* v. *Cutter Laboratories*, 351 U.S. 292, involves the totally different situation in which the employer himself terminated the employment. In such a situation, it is undoubtedly correct to say that the employee has no constitutional right to a particular job. What is complained of in this case, and what the due process clause does prohibit, is the unwarranted intrusion of government into private relationships.

Society of Sisters, 268 U.S. 510; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407.

The respondents premise their challenge to Greene's standing to sue on the assertion that they did not *require* Greene's discharge, but merely excluded him from what they denominate the "privilege" of access to classified information.[6]

This emphasis on the form of the order should not be permitted to obscure its real effect. Cf. *Powell* v. *United States*, 300 U.S. 276, 285; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 419; *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 408. This is especially true when the respondents have themselves recognized by providing for reimbursement for loss of earnings (Regulations, ¶ 23) the practical effect of the denial of clearance. See also, Department of Defense, *First Annual Report, Industrial Personnel Security Review Program*, p. 11 (1956).

In this case, while the government officials have not, in so many words, said that Greene may not work as an

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[6] In their brief in the Court of Appeals, pp. 15, 16, the respondents urged: "Appellees have not deprived appellant of his right to work for ERCO or any other employer. The Secretary of the Navy's letter of April 17, 1953, did not direct ERCO to terminate appellant's employment." In their response to the petition for a writ of certiorari in this Court, p. 12, respondents concede that the denial of clearance in practical effect deprives an employee of his job, but urge that a distinction must be observed between a situation in which that result is formally demanded and one in which it is only the inevitable consequences of the government's act. The answer to this lies in the fact that it is the interplay of governmental and private action which has damaged Greene. Cf. *National Association of Colored People* v. *Alabama*, 357 U.S. 449, 463; *Shelley* v. *Kraemer*, 334 U.S. 13.

aeronautical engineer, they have accomplished that result.[7]

However, it is attempted to justify this practical result by asserting that the respondents merely denied access to classified information, and that they have the authority to do this by virtue of the power of the government to contract to buy on such terms and conditions as it pleases. This argument relies, as it must, on *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125.

This claim must be examined in the light of realities. It is beyond dispute that one who is employed in fields dominated by defense spending, as is the aircraft industry, must have access to classified information, or he simply cannot be employed in the field.[7] As asserted by the respondents, the granting or denying of such access is a matter for their unlimited discretion. Consequently, they are claiming an unlimited power to exclude by the exercise of the economic power of the government, at will from employment. If the Secretary has such power with respect to Greene, he has it with respect to any person employed in any phase of industry in which the economic power of the govern-

[7] Greene lost employment by a company which had absolute confidence in him. Colonel Berliner testified (R. 315) that he had been willing to stake the company's future on Greene's judgment that he could build the electronic flight simulator. If an employer with this confidence could not retain him, the difficulty of persuading a stranger to give employment should be obvious. Greene's experience in finding other employments closed to him (R. 473) has been shared by others. See, for example, "Industry Goal: Simple Employee Loyalty Check," *Nation's Business*, December 1955, p. 40; Berle, *The 20th Century Capitalist Revolution*, pp. 92, 93 (1954); "Security and Constitutional Rights," *Hearings*, Subcommittee on Constitutional Rights, Committee on the Judiciary, Senate, 84th Congress, 2d Sess., pp. 230, 545, 546, 575, 621, 670-71, 597-98 (Committee print).

ment gives it influence. Since federal assistance to scientific research is important, the program has even been extended to colleges and universities, with the result that the power asserted by the respondents extends to the faculties of educational institutions. *Report of the Commission on Government Security,* p. 318 (1957).

The best estimates of the present coverage of the industrial security program is that three million employees of some 22,000 private employers are subject to this unlimited discretion of the military departments. *Report of the Commission on Government Security,* p. 235 (1957). In the field of aviation alone, the fifteen leading producers of military planes employed, in 1957, 485,760 persons in military and nonmilitary production. Standard and Poor's, *Basic Industry Analysis, Aircraft,* Jan. 2, 1958.

The difficulty of accepting a claim of unlimited discretion over such a magnitude of individuals arises from a consideration of the very nature of our government. "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369.

Perkins v. *Lukens Steel Company,* 310 U.S. 113, cannot be construed to justify the assertion that an employee deprived of his employment by reason of denial of clearance is lacking in standing to challenge that denial. This would mean that acts of a government official resulting in the gravest sort of injury are

not subject to examination in judicial proceedings. Were this to be so, administrative action aimed at a named individual which stigmatizes his reputation and seriously impairs his chance to earn a living could not be challenged in any court. Limitations on the exercise of administrative power are enforced in practice through the medium of the courts of justice. Cf. Hamilton, Federalist Paper No. 78 (Modern Library edition, p. 595).

The fact that the government has a power to enter into contracts upon such terms as it pleases does not mean that a particular officer of the government can exercise an unlimited discretion. Since no individual officer is possessed of authority co-extensive with that of the entity of "government", a claim that an officer has exceeded his particular authority—and that claim is raised by Greene—results in a justiciable controversy. This Court has recognized that "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual * * * if it is not within the officer's statutory powers or, if within those powers * * * if the powers, or their exercise in the particular case, are constitutionally void." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140. See *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 701, 702.

It should be pointed out, also, that the injury claimed in *Perkins* v. *Lukens Steel Co.*, 310 US 113, was to the competitive position of the complainants, and arose out of an alleged misinterpretation of the extent of a power granted by the express terms of a statute. Thus, the Court found that there was no

invasion of a legally protected right, since freedom from competition is not of that character. The language of the opinion, 310 US at p. 125, emphasized that the action of the government was not an invasion of legally recognized rights. But the action taken against Greene was an invasion of a legally protected right. Interference with contract rights, employment or otherwise, gives rise to a generally recognized tort action. *Truax* v. *Raich*, 239 U.S. 33, 38.

As has been demonstrated, the action of Secretary Anderson was an interference with the employment of Greene, which would, unless justified, give rise to a tort action. However, it is said that the Secretary did not interfere with the employment, but merely denied Greene the "privilege" of access to classified information. Even if this were true, it is obvious that the Secretary could not deny this privilege for invalid reasons, as for example, on the ground that one had red hair or was a Unitarian. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. See also, the comment on this passage in *Wieman* v. *Updegraff*, 344 U.S. 183, 191, 192.

Assuming, for the purposes of argument, that the matter of access to classified information is a "privilege", it is a very important one, because no one can work in the field of aircraft production—given the modern conditions in which the military departments are the dominant purchaser—without such access. It is a privilege which is granted to most citizens, and denied only to those individuals whose clearance "may not be clearly consistent with the interests of national security," and about whom information that they are not "loyal" has been received. (Regulations, ¶3, infra, p. 8a). This Court has, in a variety of situ-

ations, recognized that the claim that a privilege has been denied arbitrarily is sufficient to give the complainant standing to sue.[8]

While standing to sue may, on occasions, depend on a decision of the merits, cf., *Larson* v. *Domestic & Foreign Commerce Corporation,* 337 US. 682, 690; *Land* v. *Dollar,* 330 US. 731, 739; *Bell* v. *Hood,* 327 US. 678, 682, 683; the claim that the Secretary has merely exercised his discretion in denying a privilege cannot be sufficient to avoid a consideration of the merits on the claim that he has exceeded his authority. *Harmon* v. *Brucker,* 355 U.S. 579, 582.

Nor can it accurately be said that the case before this Court is one which is within the purview of

[8] Examples of situations in which this Court has recognized an interest sufficiently direct to warrant a determination of the merits of a claim of arbitrary action include the denial of a tax exemption, *Speiser* v. *Randall,* 357 U.S. 513, *First Unitarian Church* v. *County of Los Angeles,* 357 U.S. 545; denial of second class mailing privileges, *Hannegan* v. *Esquire,* 327 U.S. 146, 156; see also, dissents of Justices Brandeis and Holmes in *United States ex rel Milwaukee Social Democrat Publishing Co.* v. *Burleson,* 255 U.S. 407, 421-423, 430-432; 437, 438; denial of the assistance of a federal agency in labor union activity, *American Communications Association* v. *Douds,* 339 U.S. 382, 405; denial of admission to the bar, *In re Summers,* 325 U.S. 561; *Schware* v. *Board of Legal Examiners,* 353 U.S. 232, 238, 239; *Ex parte Secombe,* 19 How. 9, 13; denial of license to practice medicine, *Dent* v. *West Virginia,* 129 U.S. 114; denial of employment by federal government, *United Public Workers* v. *Mitchell,* 330 U.S. 75, *Peters* v. *Hobby,* 349 U.S. 331; *Cole* v. *Young,* 351 U.S. 536; *Service* v. *Dulles,* 354 U.S. 363; employment by state and local governments, *Slochower* v. *Board of Higher Education,* 350 U.S. 551, *Wieman* v. *Updegraff,* 344 U.S. 183; admission to a state supported institution of higher learning, *Hamilton* v. *Regents of the University of California,* 293 U.S. 245; denial of a passport (then considered to be a matter discretionary with the Secretary of State) on an improper ground, *Perkins* v. *Elg,* 307 U.S. 325, 350.

executive and not judicial power. Whether a statute can be interpreted to grant the authority claimed; whether the grant of such authority violates the restrictions of the due process clause; whether the particular exercise of the authority departs from the procedural fair play in violation of constitutional limitations; all are questions which are judicial in their very essence.

For these reasons, the claim that the Secretary of the Navy exceeded his statutory and constitutional powers in denying Greene access to clearance, thereby depriving him of his employment, raises a justiciable controversy. A consideration of the merits of the claim demonstrates that the Secretary did exceed his statutory authority and infringe the constitutionally protected rights of the petitioner.

II. THE PETITIONER WAS DENIED PROCEDURAL DUE PROCESS OF LAW BY THE REGULATIONS, AND THE ORDER OF SECRETARY ANDERSON THEREFORE VIOLATED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Due process is a concept that is at once flexible and firm. It is flexible in judging the infinite variety of circumstances which arise. It recognizes that what may be fair in one situation may be unfair in another. Because of this, only by flexibility can due process achieve firmness in its demand for fundamental "fairness between man and man, and more particularly, between the individual and the Government." Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162, 163.

The procedures in the case at bar do not remotely approach the minimum standards of fairness *applicable in this type of proceeding*. The lack of fundamen-

tal fairness is best demonstrated by a repetition of the bare procedural facts:

The order which effectively deprived Greene of the opportunity for employment in his chosen field was issued without notice to him and without an offer of a hearing. (R. 2, 3)

A request by his employer, to whom the order had been issued, for a conference with Navy officials was rejected on the ground that it would "serve no useful purpose." (R. 177)

Not until six months later, after Greene had requested a hearing, (R. 29) was one granted. (R. 21) It was held a year after the order withdrawing clearance.

Not until nineteen days before the hearing was Greene given a statement of reasons for the withdrawal of clearance. (R. 9-11) The statement was not complete. (R. 30)

No witnesses testified against Greene at the hearing. References by the hearing officers made it plain that many of the undisclosed informants on which the Government concededly relied (R. 30) were friends or neighbors of Greene, not genuinely confidential agents. (See, e.g., R. 409-413)

The hearing board's adverse decision was not accompanied by any statement of findings or reasons for the decision. Efforts of counsel to obtain such findings (R. 463, 464) in order to prepare intelligently for further action on Greene's behalf were rejected on security grounds. (R. 465) But later, *after* a further and final review, findings were supplied. (R. 22-24)

One finding was that Greene's "credibility as a witness * * * was doubtful." (R. 24) This finding, on which the Review Board put considerable emphasis. (R. 24) was of course made by weighing Greene's testimony against the very statements which he was never permitted to see, explain, or counter.

Petitioner need not attempt to say precisely what procedure the Government must follow in security cases to meet the constitutional test of fairness. There may be many alternative procedures which would constitute due process. But what was done here simply does not meet the minimum standard. The Government has open to it many ways of improving present procedures without endangering its serious and legitimate interests. The many illustrations which can be found in the thoughts of those seriously concerned with the proper balance indicate clearly that security procedures could be made less unfair to the petitioner and others in his situation without sacrificing any true interest of national security.[9] They demonstrate that,

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[9] Among such suggestions are the following:

1. The findings of fact, decision, and reasons for the decision could be made available so that an appeal would afford a meaningful opportunity to know of and correct errors in the original decision. *Report of the Commission on Government Security*, p. 289.

2. The responsible Government department (here the Navy) could be required at least to ask each informant in a case to waive any right of anonymity and appear (There is no assurance at present that such informants are even requested to allow use of their names, and there is every reason to believe that many good Americans would agree to such a request.) This proposal is less than that of the President and the Attorney General, who, on March 4, 1955, stated that "every effort should be made to produce witnesses . . . so that such witnesses may be confronted and cross-examined." Letter quoted by Report of the

weighing the interest of the individual and of the Government, the procedures afforded in this case were substantially less than due process of law.

The fundamental vice of present procedures is that there is no weighing of the competing interests in individual cases. The system, for example, forbids in absolute terms the disclosure of any informants. No official decides whether a *particular* informant could be identified without damage to national security. No official weighs the need of the alleged security risk for information against the need of the Government for secrecy—in the particular case.

Special Committee of the Association of the Bar of the City of New York, *The Federal Loyalty-Security Program*, p. 177.

3. The Government could be required to distinguish between genuine confidential agents, such as plants within the Communist party, and informants who are merely neighbors or non-secret associates of the alleged security risk, and then to identify the latter. This is recommended by the Report of the Special Committee of the Association of the Bar of the City of New York, *ibid.*, p. 174.

4. The Government and the alleged security risk could be armed with a subpoena power, limited if need be by security considerations. *Report of the Commission on Government Security*, pp. 285-287.

5. The head of the agency might be required to make an independent finding as to why secret information should not be disclosed, stating the nature of the reasons with such particularity as the circumstances permit. *Boudin* v. *Dulles*, 235 F. 2d 532, (C.A. D.C. 1956).

In summarizing these illustrative recommendations, the petitioner does not, of course, presume to state that any of them, in the infinite variety of circumstances which might arise, would constitute due process of law. The point here is that Greene was denied even the opportunity to defend himself that any one of these suggestions would have supplied.

What due process requires, in our belief, is a procedure in which the competing considerations of individual liberty and national security are weighed in each case by a responsible and identified official of the Government. If security reasons exist for limiting procedural rights guaranteed by the Constitution, there must be assurance at the least that those security reasons are considered in the individual case and not laid down as an absolute bar that may be unnecessary and unreasonable in many cases.

The conflicting rights involved in this case are the constitutionally protected right of Greene to follow a lawful calling, against which must be balanced the right of the Government to provide for the national security. Both are rights of the highest legal standing. In the balancing of these rights, a minimum constitutional prerequisite to a just determination is adequate notice and fair hearing on the facts. *Parker* v. *Lester*, 227 F. 2d 708, 719 (C.A. 9, 1955). The right to a day in court is basic to our system of jurisprudence. *In re Oliver*, 333 U.S. 257, 273. That the opportunity to be heard is ingrained as a requirement of our concept of justice has appeared in a variety of situations. In rate matters this Court has always exacted high standards of procedural fairness. *Ohio Bell Telephone Co.* v. *Commission*, 301 U.S. 292, 304. An *ex parte* order requiring the construction of an overhead railroad crossing was condemned in *Southern Railway Co.* v. *Virginia*, 290 U.S. 190. In matters of taxation, *Embree* v. *Kansas City Road District*, 240 U.S. 242; in the revocation of rights originally granted *ex parte*, *United States ex rel. Turner* v. *Fisher*, 222 U.S. 204, 208; and in the deportation of immigrants, *The Japanese Immigrant Case*, 189 U.S. 86,

notice and an opportunity to be heard have been required for the validity of administrative action. Even in the distribution of benefits by the Government and which it may withhold, the opportunity of a hearing is deemed important. *Dismuke* v. *United States*, 297 U.S. 167, 172.

A hearing in Industrial Security cases such as the one before this Court is indispensable, because the determination of whether valid reasons for the denial of Greene's clearance exist depends upon a careful examination of the facts relating to him individually. Compare *Bi-Metallic Investment Co.* v. *State Board*, 239 U.S. 441, with *Londoner* v. *Denver*, 210 U.S. 273. If those facts are to be determined fairly, a hearing, including the opportunity to dispute the adverse testimony, is indispensable.

The multiplication of "review" procedures does not furnish due process if notice of the matters to be determined, adequate opportunity to meet the case, and meaningful opportunity to present evidence in one's behalf are never afforded to the citizen whose right is to be taken away. A due process hearing need be given only once, but it must be given once. In *Morgan* v. *United States*, 301 U.S. 1, the Supreme Court defined the essentials of such a hearing (at p. 18, 19):

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities

are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

The Industrial Security regulations as applied in this case create a procedure in which a decision to deprive a citizen of his employment[10] is made without notice to that citizen,[11] who may then seek to have the matter considered. Where the hearing is sought, the citizen is informed that he is being afforded an opportunity to disprove the information against him.[12] He is advised of some, but not necessarily all, of the information against him.[13] The decision is made by subordinates of unknown competence.[14] Unsworn and hearsay gossip is included in the case against him,[15] irrespective of whether or not he has been informed of its nature. And to protect his private employment, the citizen must disprove material, the nature of which he cannot know and the source of which he cannot discredit, so completely as to convince all members of the board, because if one member is unconvinced, clearance is

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[10] It should, perhaps, be noted that the respondents contend that the action for which they are responsible does no more than deny clearance to for access to classified information. As a practical matter, in Greene's case the loss of employment was inevitable when the clearance was denied.

[11] Regulations, paragraph 18c, *infra*, p. 13a.

[12] Regulations, paragraph 19c, *infra*, p. 16a.

[13] Stipulation of facts, paragraph 23, R. 30.

[14] O'Brian, *National Security and Individual Freedom*, pp. 33, 34.

[15] Under the provisions of the Regulations, paragraph 20(a), Appendix A, *infra*, p. 18a, the Board is required to consider the complete file.

denied.[16] To meet this burden of proof he must persuade witnesses to attend the proceedings voluntarily, as there is no assistance by subpoena in securing their presence. All of the people who testify in behalf of the employee are subjected to cross-examination by the security officer who has prepared the statement of reasons, and by the members of the board, who have studied the file of the case. However, none of the witnesses who are supposed to have furnished derogatory information are subject to any cross-examination, either by the employee or his counsel, or by the board members. As a result, the natural frailities of the employee's witnesses are exposed, while those of the adverse witnesses remain safely hidden in the anonymity of such phrases as, "an apparently reliable witness."

The determination of the board relates not to past misconduct—no one has accused Greene of any conduct which was illegal, immoral, or unreliable—but is an attempt to predict future conduct, which may be voluntary or involuntary. (R. 37)

All of these aspects of lack of fair play are important, because each contributes to the over-all lack of fairness. In a true effort to balance the demands of the national security against Greene's demand for protection in his employment, the elimination of one

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[16] Testimony of Jerome D. Fenton, "Security and Constitutional Rights," Hearings before the Subcommittee on Constitutional Rights, pp. 608, 609. In a letter dated February 29, 1956, Mr. Fenton stated that, "Cases must be referred to Review Board when Hearing Board issues a split decision, whether favorable or unfavorable." Report of the Special Committee of the Association of the Bar of the City of New York, *The Federal Loyalty-Security Program*, p. 224 (New York, 1956).

might be compensated for by insistence upon another type of safeguard. But the refusal of all of them is a negation of the rudiments of fair play.

A comparison of the requirements of the Administrative Procedure Act, 60 Stat. 241 et seq., 5 U.S.C., §§ 1006-1007, shows that the procedure established by the Industrial Security regulations falls far short of what Congress has, with respect to potential injuries far less serious than exclusion from the pursuit of a chosen occupation, considered essential to fair play. *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50, 51. Since Congress has not spelled out any procedures for this deprivation of a citizen's private employment, if statutory authority for the program is found to exist by implication, the statute from which such an implication is derived should be construed in a manner which does not make it repugnant to the due process clause.

Some of the aspects of the lack of procedural fairness should, however, be discussed in greater detail.

A. The absence of a positive requirement that the charges state fully and fairly all of the matters upon which it is proposed to base the adverse action imposes such a handicap on the defense of the employee as to infringe the requirements of procedural due process.

The first infringement of the due process clause by the Industrial Personnel Security regulations is found in the first step of the formal proceedings by which the employee is deprived of his employment.

The regulations make it explicitly clear that the employee need not to receive any full statement of the allegations on the basis of which the government proposes to destroy his right to earn a livelihood.

The regulations (Section 16d, *infra*, Appendix A, p. 13a) provides that the Screening Division "will, in collaboration with the Security Advisor and the Legal Advisor, prepare a notice of proposed denial of revocation of clearance and a Statement of Reasons which will be as specific and detailed as, in *the opinion of the Screening Division, security considerations permit*, in order to provide the contractor or contractor employee with sufficient information to prepare a reply." [Emphasis Supplied]

That information was withheld in the present case was stipulated by the government. (Stipulation of Facts, paragraph 23, R. 30) but what information was withheld, and whether the reasons are in fact valid can never be reviewed—not even by this Court—because no one is permitted to see the file of the case, except those employees of the respondents who participate in the actual making of the decision. It may be something Greene can, if given the opportunity, refute beyond question. It may be a misinterpretation by an informant, or by the investigator in quoting him. It may involve something wrongly attributed to some person who has actually testified in Greene's behalf, but because neither the employee, nor the board, nor this Court knows its supposed source, its refutation remains undisclosed.

That a decision founded upon such concealed matters violates all concepts of fundamental fairness and the due process clause cannot be seriously disputed. In criminal cases, due process prohibits a conviction on a charge which is not made. *De Jonge* v. *Oregon*, 299 U.S. 353, 362. While it is true that this is not a criminal proceeding, it is a proceeding in which Greene is losing

his employment on the basis of a prediction as to future conduct putatively based on past conducts and associations.

The requirement of full and adequate notice is observed in the determining of a claim of conscientious objection to military service. That this is a privilege which Congress can grant or deny in its discretion is clear. No less should be required as a pre-requisite for depriving a citizen of his private employment. Yet the treatment accorded Greene is far less than that accorded the conscientious objector, who must be afforded "a fair opportunity to . . . speak his piece before an impartia hearing officer; . . . [permitted] . . . to produce all relevant evidence in his own behalf and at the same time [supplied] him with a fair resume of any adverse evidence in the investigator's report." *United States* v. *Nugent*, 346 U.S. 1, 6. See also, *Gonzales* v. *United States*, 348 U.S. 407, 415; *Simmons* v. *United States*, 348 U.S. 397. In the latter case, this Court said, "The Congress, in providing for a hearing, did not intend for it to be conducted on the level of a game of blindman's buff."

B. The proceedings provided for by the Industrial Personnel Security Regulations violate due process by failing to require a decision on an open record and by placing the entire burden of proof on the employee.

A reading of the transcripts of the administrative hearings in this case demonstrates that although this matter has been considered *in extenso* on two occasions, never once has any person appeared to say anything to Greene's detriment.

The basis upon which Secretary Anderson, and subsequently the board, found against Greene was the con-

tents of a "case history file." This document was, of course, prepared by an investigative agency, in all likelihood the Federal Bureau of Investigation. This is a mass of interviews with persons of all sorts and varieties and of undetermined reliability. Secretary of State John Foster Dulles, Press Conference, 28 *Dept. of State Bulletin 518* (1953); see also, *Jay* v. *Boyd*, 351 US 345, 365. It clearly constitutes hearsay. As such, it can not be the basis of an administrative order. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 US 197, 230.

That in the normal judicial and administrative processes, action, if it is not to be arbitrary, must be based upon evidence supplied by witnesses who are subject to cross-examination is apparent.

This Court has held that administrative orders, quasi-judicial in character, are void if a hearing is denied, and to constitute a hearing, "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." *Interstate Commerce Commission* v. *Louisville and Nashville R. Co.*, 227 US 88, 93; *Carter* v. *Kubler*, 320 US 243, 247; *In re Oliver*, 333 US 257, 273; *Reilly* v. *Pinkus*, 338 US 269, 275, 276; *In re Murchison*, 349 US 133, 138, 139.[17]

[17] There are limited exceptions to the general requirement of cross-examination. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (tariff determination); *Escoe* v. *Zerbst*, 295 U.S. 490 (revocation of parole); *Williams* v. *New York*, 337 U.S. 241 (use of out of court evidence in fixing sentence). *Jay* v. *Boyd*, 351 U.S. 345, and *Shaughnessy* v. *United States ex Mezei*, 345 U.S. 206, involved the discretionary power of the Attorney General to suspend deportation and the exclusion of an alien. None of these cases, however, involved the destruction of a citizen's right to pursue a chosen occupation without affording him a fair hearing at some stage prior to the final determination of the proceedings.

The government resists Greene's demand to hear and cross-examine the witnesses against him on the assertion that the demands of national security are such that the government can not reveal the identity of its witnesses. Since Greene, and possibly the board itself, does not know the identity of the witnesses thus protected, surmises as to who these protected people were are necessary. This record indicates that most, of not all, of the informants were people who claimed to have had a personal acquaintanceship with Greene.[18]

To excuse such people from an examination of their bias, prejudice, opportunity to observe, meaning of terms, and other aspects relating to the credibility of what they have to say, merely because it is inconvenient to them to appear and testify, is not a rational

[18] For example, one informant "identified himself as having been a very close friend of yours over a long period of years." (R. 409). Another was described as "another one of your associates." (R. 413). One, of course, was Colonel Berliner, the man who would stake the entire future of his company on Greene's judgment. (R. 405). Since, in point of fact, all of the people who could accurately describe themselves in such terms and who could be reached were called as witnesses in Greene's behalf, it is more than likely that the informants quoted by the security officer had already testified under oath in Greene's favor. It should also be noted that the informant who charged Greene with reading pro-Communist books, (R. 410) also stated that Greene was not a communist, but that Jean was a "parlor pink." Although it would seems that these security boards have noted no observable difference between a "parlor pink" and a Communist it would appear reasonable to suppose that this particular informant agreed the term "ardent Communist" was not properly applicable to Jean Hinton Greene.

balancing of the necessities, especially in an issue so vital to the employee as loss of employment.[19] "The concept that it is the duty of a witness to testify in a court of law has roots . . . deep in our history . . ." *Garland* v. *Torre,* 259 F. 2d 545, 569 (CA 2, 1958).

Confrontation is an essential of a reasoned decision. Secret examinations are wrong because they are not conducive to truth-seeking. That security determinations have been especially vulnerable to error is demonstrated by the fact that it has been estimated that in about eight per cent of the federal cases, informants upon whom reliance has been placed have been found untrustworthy or, if trustworthy, have been incorrectly reported. Bontecou, "Due Process in Security Dismissals," *300 The Annals of the American Academy of Political and Social Science,* at p. 107. This Court has itself had occasion to observe that these "confidential informers" have on occasions been guilty of outright perjury. *Mesarosh* v. *United States,* 352 US 1; *Communist Party* v. *Subversive Activities Control Board,* 351 US 115.

[19] Cf. *Parker* v. *Lester,* 227 F. 2d 708, 720 (CA 9, 1955):

> . . . It may be assumed that this determination will remove from the investigative agencies, to some degree, a certain kind of information and that, in the future, some persons will be deterred from carrying some of these tales to the investigating authorities. It is unbelievable that the result will prevent able officials from procuring proof any more than those officials are now helpless to procure proof for criminal prosecutions. But surely it is better that these agencies suffer some handicap than that the citizens of a freedom loving country shall be denied that which has always been considered their birthright. *Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of such talebearing.* [Emphasis supplied]

Does the employee really need the right to confront and cross-examine the witnesses against him? The need for such a right is illustrated, in different facets, in the two cases involving the Industrial Personnel Security regulations in which this Court has granted certiorari, the present case and *Taylor* v. *McElroy,* No. 504, October Term, 1958. In the Taylor case, the adverse determination against the employee was based on the assertion, although the form of the assertion in the "Statement of Reasons" seems to have undergone the not unusual metaphorphasis in terms, that Taylor had at one time, but was no longer, a member of the Communist Party. (Petition for a writ of certiorari, pp. 6-8). This assertion Taylor vigorously denied, and supported his denial with sworn testimony, only to discover that the Board believed the unidentified informants, and denied Taylor clearance. Then, after this Court granted certiorari, the Secretary of Defense reversed the previous decision and granted Taylor clearance. Evidently, further consideration or investigation had persuaded the Secretary that the word of the informants could not be believed on a matter of objective fact, Taylor's alleged party membership. No clearer demonstration could be given of the dangers of reliance on untested informants.

Greene illustrates an even more important facet of the need for a detailed cross-examination. The respondents have suggested that Greene does not really need to cross-examine the witnesses because he has not denied his acquaintanceship with some of the persons listed by the security screening division as Communist party members and "strong supporters of the Communist conspiracy." It can be affirmed that Greene did in fact have a casual acquaintanceship with these

people. But this is a far cry from any rational basis for asserting that he knew of, or approved of, the things that are charged against them.

The matters stated must be evaluated in context, and this means that any fair judgment must be rested on much more adequate knowledge of the informant's opportunities for observation, the informant's understanding, and his motives. If some one asserts that Greene was in general agreement with his former wife's political viewpoint, the informant's opportunity for observation is most material in determining whether to believe him in the face of overwhelming contradiction.

Here the statement of reasons is couched in terms which almost cry out on their face for the kind of specification that can be had only by face to face questioning. Jean Hinton Greene, it is said, had "wild ideas," "etc." What does this mean?

The need for cross-examination to afford the employee any fair chance to defend himself is apparent. The matter comes to this. An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked, as for example, tariff data which was involved in *Norwegian Nitrogen Products Co.* v. *United States*, 288 US 294. But here, we are dealing with subjective interpretations of the employee's subjective beliefs. We are doing so in an atmosphere naturally surcharged with emotion and in fear of the very real threat inherent in the military power of the Soviet Union. The meaning and worth of the data depends upon a host of in-

tangibles. "One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point. * * *"[20]

Graphic illustrations of this gathering of evidence are afforded by this case. For example, the Security officer (R. 379) read a sinister inference into the fact that the former Mrs. Greene slept on a bed-board, when he cross-examined Dr. Marjorie Greenberg, the employee's sister. The board was apparently unimpressed by the simple medical fact stated by Dr. Greenberg, a physican, that ". . . everybody I've ever known who had any disturbance with their spinal column had to sleep on a board." A similar attempt at sinister inference is to be found in questions regarding the alleged photographic laboratory in the basement of the Silvermaster house. Greene testified without reservation that he had seen this laboratory and had been in this "developing" room.[21] The security officer deduced from this that Greene was especially trusted by Ullman, abruptly brushing aside the apparently rea-

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[20] Mr. Justice Holmes, in a letter to Arthur Garfield Hays in 1928. Quoted by Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171.

[21] There is no one who can truthfully say that Greene has not on all occasions testified freely concerning his knowledge of the Silvermasters. One example is the fact that while these proceedings were pending in the District Court, Greene was *requested* to appear before the Subcommittee on Internal Security of the Senate Judiciary Committee, in connection with the activities of his former brother-in-law, whom he knew only slightly. He did so on July 27, 1954, and the record indicates that he answered every question put to him without reservation. "Interlocking Subversion in Government Departments," *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Committee on the Judiciary*, Senate, 83rd Congress, 2d Session, Part 23, pp. 1741-1747.

sonable suggestion, "I would say that the best way to describe Ullman's action was showing off with what he had." (R. 429).

This need for cross-examination is a need of all concerned in these proceedings. Obviously, it is a need for the employee, if he is adequately to meet the issues. It is a need for the tribunal, for "By no other means can those who must judge their fellow men minimize to the fullest extent the mistakes which humans make.[22] It is a need of the public because morality is fundamental to the preservation of our system of government. "In a country with our moral and material strength the maintenance of fair procedures cannot handicap our security. Every adherence to our moral professions reinforces our strength and therefore our security." Mr. Justice Frankfurter, dissenting in *United States* v. *Nugent*, 346 US 1, 13.

These considerations make undeniable the requirement of the due process clause that the casual informant, the ordinary citizen, at least, be called to testify.

Does the undercover agent or the truly confidential informant fall in a different category? The answer to this lies in the way in which the respondents propose to use their undercover agents. Obviously, it is common knowledge that most police agencies do in fact utilize the services of such persons, although in matters other than those said to involve security, they are designated by a somewhat less flattering name. When these people are used as a means of securing evidence which can be produced against the person affected, there can be no legal objection to their use. But the

[22] Harry P. Cain, Address to New York Civil Liberties Union, February 22, 1956. See also, Stephens, *Administrative Tribunals and the Rules of Evidence*, p. 96.

distinction lies in the fact that it is not the "confidential informant" whose testimony forms the basis of depriving a person of his liberty or property. The decision turns on the evidence which is actually produced on the record, and short of such immoral practices as wire-tapping or affirmative violations of the constitutional guarantees, such as illegal searches, the trier of facts is not concerned with the means by which the evidence has been secured. The essential is the evidence actually produced. But if the trier of facts is to act upon the statements of informants, they must be identified and their veracity tested by cross-examination. These are not novel doctrines. To prosecute a petty thief or a narcotics peddler, the government would have to produce its witnesses openly. In those situations in which information of an informer is utilized as the basis of a search warrant, the government is required to identify him. *Roviaro* v. *United States,* 353 US 53, and to make previous statements of the informant available to the defendant to assist in his cross-examination. *Jencks* v. *United States,* 353 US 657, 667.

Why should these rights be denied to a person guilty of nothing illegal when it is proposed to deprive him of his livelihood because some administrative official has not been convinced beyond peradventure of a doubt that he might, at some unpredictable future time, be guilty of something that he has never done and probably will never do?

The government's answer is an evasion of this question. It says that it should not be forced to choose between revealing the confidential sources of its information and the revealing of classified military information. Certainly, the government should not be forced

to any such choice. But it is not. It is only forced to prove a case, securing its evidence by any leads and any methods available to it, but proving its case by evidence. The only possible answer to the supposed problem of the Government is that if the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his liberty, they must be put to the test of due process of law.

C. The Industrial Security regulations violate the requirements of the due process clause by shifting to the employee the burden of disproving charges so vague that it is impossible to know what the offending conduct is.

The most startling infringement of the constitutional guarantees included in the concept of due process is the establishment, although not in such terms, of presumptions which are irrefutable.[23] The record in this case is replete with examples of such mental processes on the part of the security officers. Someone, somewhere, has been labeled as subversive. In point of fact, he may have had a hearing and succeeded in demonstrating that the label was incorrectly applied to him, but nevertheless, an acquaintance with him may be sufficient to deprive an employee of his livelihood, because in practical effect he is not permitted to chal-

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[23] See, by way of illustration, 13 Fed. Reg. 9372, 5 C.F.R. § 220.4(d). Whether the presumptions are technically irrebutable or not, they are irrebutable in practice, e.g., Yarmolinsky, *Case Studies in Personnel Security*, p. 7 (Washington, 1955). Here, a board chairman suggested that once an individual is called a "known Communist", "the only safe thing . . . is to assume that the Government knows what it is talking about." See also, Cushman, *Civil Liberties in the United States*, pp. 186-191, (Cornell, 1956).

lenge the designation, assuming, of course, that he is able to do so.

The crux of this matter is that due process requires that the burden of proof be placed where it ought to be: the security officer should be obliged to show by evidence that the questioned individual was, in fact, a person of ideas which are within the scope of security inquiries. And we respectfully suggest that this does not mean ideas which on their face are innocent, such as a hope for greater industrialization and consequently better living conditions in the South.[24]

That this burden properly belongs on the security officers is demonstrated by the opinion of this Court in *Speiser* v. *Randall*, 357 US 513, 520, 526:

> To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the

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[24] See, for example the passage between Greene and the board during the first hearing (R. 123), in which Greene was asked by a member of the board,

> Q. Didn't you say that you *suspected* them of being Communists? A. Well, then, if I said that I made a mistake. I said that I suspected they were left wingers.
>
> Q. Wasn't your idea of a left-winger synonymous with that of a Communist? A. No, but it is now.
>
> Q. Wasn't it then? A. I thought they were just liberals.
>
> Q. That is a play on words. A. That is what I thought at the time.
>
> Q. What does the word *liberal* mean in your estimation? Doesn't it mean connected with Communism and Russia?

more important the rights at stake the more important must be the procedural safeguards surrounding those rights.

* * *

The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements?

These shifting sands become more treacherous because the record seriously challenges the assertion of the subversive character of these organizations (e.g. R. 243-246). The Department of Defense has admitted that it does not examine the basis of citations of subversive organizations.[25] Findings based solely on the fact that such organizations have been listed are arbitrary. *Shachtman* v. *Dulles,* 225 F. 2d 938 (C.A.D.C., 1955); *Kutcher* v. *Gray,* 199 F. 2d 783 (C.A.D.C., 1952). This undoubtedly explains, but hardly justifies, the apparently serious finding of the Review Board im-

[25] The admission that the Army makes no independent investigation of listing by the Attorney General or the House Committee on Un-American Activities was made by Hugh M. Milton, Assistant Secretary of the Army, in his testimony before the Senate Subcommittee on Constitutional Rights of the Committee of the Judiciary. *Hearings,* November 22, 1955, pp. 511, 512.

puting subversive characteristics to a radio station (R. 24) on the basis of a charge by an unidentified informant that its news coverage, supplied by the Associated Press, paralleled the Communist Party "line".

The criteria[26] established by the regulations are twenty one in number, ranging from the commission of espionage, sabotage, or sedition, to the presence of a relative in a foreign country.

The generalized direction to the boards, which certainly authorizes them to consider the listed matters, in terms permits them to consider other matters, as in fact they do.[27] Consequently, the vagueness inherent in the official statement of the standards and criteria for denying clearance is compounded and magnified by the injunction to consider "all available information."

The specific criteria increase rather than diminish this vagueness. For example, criterion number 15 *infra*, p. 11a, states as a ground for denying employment:

> Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy;

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[26] These criteria have uniformly been condemned as too vague to confine the security program within its legitimate scope. See, for example, *Report of the Commission on Government Security*, pp. 268-270; Report of the Special Committee of the Association of the Bar of the City of New York, p. 152; Brown, *Loyalty and Security*, pp. 391-394.

[27] Examples of the way in which the security boards range through private beliefs on the supposed justification of establishing a pattern of agreement with Communist beliefs are collected in Bontecou, *The Federal Loyalty Security Program*, Chapters IV and V, (Cornell, 1953).

and criterion number 20:

> Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the national interest;

and criterion number 10:

> Sympathetic interest in totalitarian, Fascist, Communist, or similar subversive movements.

The list could be multiplied, but these are sufficient to show that no human being, enmeshed in security proceedings, could prove his future innocence. His only hope would be that the Board would exercise its restraint, but the fact "[t]hat a conclusion satisfies one's private conscience, does not attest its reliability. . . . [S]elf-righteousness gives too slender an assurance of rightness." Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. at p. 171. The "offending" conduct need not be illegal, immoral, or anti-social—for no such conduct is even hinted against Greene—in order for the Board to adjudge a citizen a potential traitor.

III. THERE IS NO STATUTORY AUTHORITY FOR THE ISSUANCE OF A DENIAL OF CLEARANCE FOR ACCESS TO CLASSIFIED INFORMATION, THEREBY DEPRIVING AN EMPLOYEE OF HIS WORK.

The Industrial Personnel Security regulations are assumed to rest upon the power of the government to contract with respect to its own purchases. The provisions of the security manual are imposed through a "security agreement". (Exhibit A to Amended and Supplemental Answer, R. 17-21). "The operation of

the industrial security program may thus be said to rest upon Government regulations and upon contractual obligations. These regulations and obligations do not, however, constitute the legal basis for the program as a whole. Such a basis must be found in a statute which authorizes the executive branch of the Government (and the Department of Defense in particular) to establish this program." *Report of the Commission on Government Security*, pp. 249, 250 (1957).

The power to provide for the common defense through the raising and maintaining of armies and navies is vested in the legislative department. Constitution, Article I, Section 8. It is from that grant of power that the authority to make contracts must be derived.

There is no statute which, in express terms, confers upon any administrative official any power to exclude any person from private employment. The respondents admit this.[28] Their reliance for statutory authority is upon the Armed Services Procurement Act of 1947, and specifically upon Section 153 of that Act, 62 Stat. 21, 41 U.S.C. (1952 ed.) § 153, which provides,

[28] The conclusion that the respondents admit the absence of express authority for their action is fairly supported by the argument advanced in their brief in the Court of Appeals, p. 18, in which they say: "The Government, acting through the Department of the Navy, of course has the right to enter into contracts, including classified procurement contracts, with ERCO. Such power was conferred by various appropriation acts and by the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. (1952 edition), §§ 151-161.

> * * * Except as provided in subsection 9(b) of this section, contracts negotiated pursuant to section 151(c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. * * *

The assumption that this provision authorizes unlimited discretion in the respondents to control employment in private industry by granting or denying access to classified information is in direct contradiction to the principles of statutory interpretation underlying *Kent* v. *Dulles*, 357 U.S. 116. In that case, this Court was concerned with the power of the Secretary of State over the issuance of passports under an act which provided that "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate. . . ."

Even this broad language was not sufficient to grant the Secretary an unlimited discretion as to the issuance or denial of passports. The Court said, 357 U.S. at p. 129):

> If that "liberty" [of travel] is to be regulated, it must be pursuant to the law-making functions of the Congress. . . . And if that power is to be delegated, the standards must be adequate to pass the standards of the accepted tests. . . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."

See also, *Ex parte Endo*, 323 US 283, 301-302. Cf. *Hannegan* v. *Esquire*, 327 U.S. 146, 156; *United States* v. *Rumely*, 345 U.S. 41, 46.

Nor can the interpretation that this statute gives the respondents the power they claim be derived from

any supposed ratification through the appropriation acts. The Department of Defense has consistently assured the Congress that no clearance is denied without "a fair hearing".[29] The discussion of the procedures under the Industrial Personnel Security regulations, *supra*, pp. 51 to 53, demonstrates that the proceedings which are held cannot accurately be described as a "fair hearing" or a "full hearing." Nothing in any of the appropriation acts refers to the Industrial Personnel Security program in express terms, or in terms which indicate knowledge of what the program is or how it works. Consequently, the rule of implied ratification expressed in *Ludecke* v. *Watkins*, 335 U.S. 160, 173n. *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Brooks* v. *Dewar*, 313 U.S. 354, 361; and *Isbrandsdtsen-Moller Co.* v. *United States*, 300 U.S. 139, 147, has no application to the Industrial Personnel Security program.

Congress has never focused on the problem of industrial security and specifically authorized the present program. Indeed, the Committee on the Judiciary of the House of Representatives rejected a proposal to grant the executive authority to issue regulations excluding subversives from a broadly defined category of defense facilities, (H.J. Res. 527, 83rd Congress, 2d Sess.) on the ground that it was not drawn "so as to enhance the security of the United States, but not to limit the constitutional rights of citizens on the other hand." House Report No. 2280, House of Representatives, 83rd Congress, 2d Sess., p. 3.

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[29] Cf., e.g., Department of Defense Appropriations for 1956, Hearings before the Subcommittee of Committee on Appropriations, House of Representatives, 84th Congress, 1st Session, pp. 774, 775.

If Congress had focused on the broad problem, it might well have granted more restricted authority than that now claimed, limiting it by definitions of the term subversive and balancing it with appropriate procedural safeguards, as it did in providing for the exclusion of dangerous persons from defense facilities in the Internal Security Act of 1950, Act of September 23, 1950, ch. 1024, Title I, §§ 1-21, as amended, 64 Stat. 937, 50 U.S.C. §§ 781-791. The distinctions between the method adopted by Congress and the methods of the Industrial Security program are manifest and important in the preservation of constitutional liberties. Congress delegated the authority to determine these issues, not to the respondents, but to specially appointed administrative officers, who occupy positions of quasi-judicial responsibility. The penalty of exclusion applies only to actual members of Communist action organizations, as contrasted with the almost irresponsible uses of any designation by the respondents. An example of this irresponsibility is to be found in the assertion that Radio Station WQQW was said to be "reliably reported" to be pro-Communist. (R. 10, ¶ 5). The act provides for full hearing and judicial review of the designation of an organization. Finally, the penalty of exclusion from defense facilities applies only to an individual whose membership is continued after the designation by the board.

These important differences make it clear that this act provides for such exclusions from employment as are authorized, and has prohibited the inconsistent procedures established by the respondents. *Little* v. *Barreme*, 2 Cranch, 170.

An attempt has been made to justify the exercise of the contract power of the government to insist upon the security agreement and consequent control of the right of private employment as "an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the Constitutional powers confided to it, and through the instrumentality of the proper department to which these powers are confided, enter into contracts not prohibited by law, and appropriated to the just exercise of those powers * * *" *United States* v. *Tingley*, 5 Pet. 115, 128. The proper scope of this understandable doctrine of the right of contract, and the implied authority to negotiate incidentals of the work, such as provisions for the settlement of disputes, as in *United States* v. *Moorman*, 338 US 457, can not and should not be extended to justify the demand for a contract right on the part of the government to interfere with existing contract relations between the employer and his employee.

There is no implied authority on the part of the executive to exercise such far-reaching control, either from the power to execute the laws nor the power of the President as commander-in-chief. The principle stated by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579, 588, forecloses the claim of such implied authority. The Court said,

> The power of the Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working con-

ditions in certain fields in our economy. The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

Inasmuch as the authority of the respondents, under the guise of granting or denying clearance for access to classified information, to control employment in private industry has not been granted by statute, and cannot be implied from the authority of the president as commander-in-chief, it is clear that there is, in fact, no such power on the part of the respondents. But even if Congress attempted to grant the unlimited authority so to interfere with private employment as the respondents have attempted here, that grant would be invalid, since it would violate the due process clause of the Fifth Amendment both as to substantive due process and as to procedural due process.

IV. THE ORDER DEPRIVING GREENE OF HIS EMPLOYMENT IS A VIOLATION OF THE SUBSTANTIVE REQUIREMENTS OF THE DUE PROCESS CLAUSE.

If, contrary to our belief, Congress has authorized the industrial security program, or if that authority can be inferred, then the regulations as adopted and applied in this case by the Defense Department deprived Greene of substantive due process. The regulations, as applied, are without a rational basis and have no substantial relationship to any permissible ends of the Government.

The power of any branch of the Government to deprive Greene, or any other citizen, of his employment for reasons thought to be relevant to security must find its beginning in the war power, or in the inherent power of the government to protect itself from violent

revolution. The war power is of course, broad, but it is not absolute. It is subject to the limitations of the Constitution, including those of the due process clause. *Galvan* v. *Press,* 347 U.S. 522, 530, *Hamilton* v. *Kentucky Distilleries & Warehouse Corporation,* 251 U.S. 146, 156. Likewise, the prohibitions against bills of attainder and *ex post facto* laws, and the more specific limitations of the Bill of Rights apply in limitation of the war power. *United States* v. *Cohen Grocery Company,* 255 U.S. 81. These limitations of this power require an examination of the Industrial Personnel Security regulations in an effort to balance the right of the Government against the conflicting right of the individual for protection in his employment.

The Fifth Amendment conditions the exertion of an admitted power, in this instance, the war power, by securing that the end shall be accomplished by methods consistent with due process. The guaranty demands that the law shall not be arbitrary, unreasonable, or capricious, and that the means selected shall have a real and substantial interest to the object sought to be attained. *Nebbia* v. *New York,* 291 U.S. 502, 525; *Chicago* v. *Sturges,* 222 U.S. 313, 322. The Industrial Personnel Security regulations do not meet this test.

The permissible aim of the government in such regulations is the prevention of espionage, sabotage, or violent revolution. These regulations, measured by their results, cannot achieve that end. In their effort to do so, they have trenched heavily upon constitutionally protected rights of the citizen. The methodology underlying these regulations is an extensive inquiry into the beliefs and associations of the employee. That the process inevitably interferes with freedom of

thought and association is undeniable. Cf. *Watkins* v. *United States,* 354 U.S. 178, 197, 198; *United States* v. *Rumely,* 345 U.S. 41, 46. The denial, even of a privilege or bounty, as a penalty for the exercise of rights protected by the First Amendment is constitutionally invalid. *Speiser* v. *Randall,* 357 U.S. 513, 518. This danger of infringement of the constitutionally protected rights of the citizen warrants an especial scrutiny of the Industrial Personnel Security Regulations.

The primary test of the validity of the regulations is whether they succeed in achieving the purpose of preventing espionage, sabotage, and revolution, and, as a secondary consideration, whether the cost for the good, if any, accomplished demonstrates that the means are not rationally adapted to the permissible ends.

The underlying philosophy of personnel security regulations is that it is the right and the duty of the government to protect the nation by preventing espionage and sabotage. To a program designed to prevent such acts and concerned with facts from which a reasonable probability of the occurrence of these crimes could be inferred, there could be no challenge. Such a system would not conflict with the rights of any citizen. But this is not the system created by the Industrial Security regulations. The system being judged in this case is a system of preventative security which in its attempt to predict future conduct has menacing overtones of the totalitarianism against which the nation is supposedly being protected; a system which seeks to found its judgments on vague notions of undefined concepts of "subversion"; a system, which as is demonstrated, *supra,* pp. 29 to 36, has found it necessary to eliminate all of the concepts of fair play which had

been traditional with our democracy; a system which has permitted real spies and saboteurs to escape;[30] a system which has been uniformly condemned by those

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[30] That there have been cases of espionage in recent years in our country is obvious. But the essential fact is that, even as to those persons who have been accused and convicted of spying, the ideological tests of the security program, and its forerunner, the loyalty program, have not revealed any of these people. The examples are noteworthy. In the forefront, of course, is the case of Julius Rosenberg and those associated with him. These persons were convicted of spying. *Rosenberg* v. *United States,* 195 F. 2d 583 (CA 2, 1952). But there was nothing in the examinations under the security programs which revealed their identity. Judith Coplon (*United States* v. *Coplon,* 185 F. 2d 629 (CA 2, 1950)) passed the loyalty tests in the Department of Justice. William Remington was cleared by a Loyalty Review Board. The ineffectiveness of the ideological testing upon which these programs are based is discussed in Brown, *Loyalty and Security,* 229-231 (Yale University, 1958). Counter-espionage and criminal prosecutions have proved our best weapons against spies. This is demonstrated by *Abel* v. *United States,* #263, October Term, 1958. Colonel Abel, of the Soviet espionage agency, was caught by the weapons of counter-espionage. Since he apparently avoided any subversive connections, the Industrial Security program would never have exposed him. There is no evidence that the security programs have exposed any espionage agents. On the contrary, Seth W. Richardson, Chairman of the Loyalty Review Board has stated positively that that program had indicated not a single case of espionage. *State Department Employee Loyalty Investigation,* Hearings, subcommittee of the Committee on Foreign Relations, Senate 81st Cong., 2d Session, (1950), pt. 1, p. 409. That the loyalty-security cases involve no espionage is confirmed by an examination of the fifty cases collected in Yarmolinsky, *Case Studies in Personnel Security,* (Washington, 1955) and the thirty cases analyzed in the appendix of the Department of Defense, *First Annual Report, Industrial Personnel Security Review Program.* Not a single charge in a single one of these cases relates either to espionage or sabotage. All are concerned with ideological sympathies and associations, except for a small minority which involve dishonesty, criminality or immorality.

who have analyzed it;[31] a system which ignores completely the rights of the employee in balance with the legitimate aims of the Government. The Industrial Security regulations depend upon criteria which are impossible of concrete application.[32] They lump indiscriminately knowing and unknowing conduct. Cf. *Wieman* v. *Updegraff*, 344 U.S. 183. They are incapable of results which can ever be really tested for correctness, because since the affected employee has not in the past been guilty of illegal or immoral conduct, it is simply impossible to verify the security officer's prediction that he will be guilty in the future. It is a program tremendous in its costs, both in money and in the more important but less tangible aspects of its harm to positive security, its discouragement of scientific and technological advancement, its injury to international standing, its harm to the morale of our people, and most of all, its damage to our national ideals. Report of the Special Committee of the Association of the Bar of the City of New York, *The Fed-*

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[31] For example, *Report of the Commission on Government Security*, p. 266, flatly states that the present program of industrial personnel security should be abolished. The report of the Special Committee of the Association of the Bar of the City of New York, *The Federal Loyalty-Security Program* (New York, 1956) asserts the need of a continued program of this nature, but calls for substantial revisions in the criteria, procedures, and administration of the program.

[32] The respondents rely heavily upon the war-time case of *Von Knorr* v. *Miles*, 60 F. Supp. 962 (D. Mass. 1943). That case, while it upheld summary procedures in excluding an employee from defense plants, can not be taken as support for the present program. At the out-set, there is a distinction in the fact that the Von Knorr case arose in a time in which the nation was actually at war against an enemy which was known to rely on sabotage, and had sent trained saboteurs to the United States. The considerations which support a governmental action as reasonable in war

eral Loyalty-Security Program, Chapter VII, p. 121 et seq.

A constitutionally acceptable balance between the Industrial Security system and the rights of citizens will never be correctly achieved without the realization that,

> The point of departure for a United States security system, ... is . . . . the preservation of the democratic principles and institutions guaranteed by the Constitution. We must set these above all else and permit personnel security, in the popularly understood sense, to exist only so long as these principles and institutions are undamaged by it. If, through a belief in the need for personnel security, we lose our democracy will will have lost it as irretrievably as if we had been conquered in a hot or cold war. In fact, we will have lost the war to communism without the enemy having taken a hand in the conflict.
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> —Huard, "The Federal Loyalty-Security Program as Seen by the New York City Bar Association," 45 *Georgetown Law Journal* 223, 231.

If we weigh the temporary safety of secrecy against the dangers to the liberties inherent in our democratic

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time are not necessarily present in peace-time, and this Court has noted that what may be reasonable in times of war is quite different from what is reasonable in time of peace. *Kent* v. *Dulles*, 357 U.S. 116.

The primary difference however is the fact that the program which was upheld in *Von Knorr* was a specifically limited program. It provided for the discharge of "subversives" from war plants, but the term "subversive" was carefully limited to those cases where there was good cause to suspect an employee of sabotage, espionage, or any other willful activity designed to disrupt the national defense program. The administrative officers were specifically directed not to suspend an employee as a result of idle rumor, normal labor activity, gossip, or anonymous communications. See, *Report of the Commission on Government Security*, p. 237.

system, the Industrial Personnel Security regulations cost too much in terms of our confidence in our democratic heritage. They supply too little safety for that cost. They do not meet the test of rational relationship to a permissible aim of government.

The irrationality of the proceedings against petitioner can best be seen in a succinct review of the facts.

The charges relate to associations and activities that ended by 1947 (with the single exception of the Currie association continuing into 1948). Petitioner and his former wife, with whom many of the charges are connected, were divorced in 1947. For more than five years afterward petitioner was permitted and encouraged to do classified work for the Government. His security status was tested and approved. Petitioner was never charged with any violation of any security rule or regulation. Then, in 1953, he was effectively deprived of his job—and of opportunity to obtain similar employment—on the ground that the associations and activities which he had concededly discontinued at least five years previously made his future conduct doubtful despite the objective evidence of loyal, perfectly secure service for the Government in the intervening years.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, and the District Court should be directed to declare the order of Secretary Anderson to be invalid.

CARL W. BERUEFFY
215 C Street, N. W.
Washington 1, D. C.

Attorney for the Petitioner